SUPREME COURT, U. S.

In the Supreme Court

OF THE

United States

Supreme Court, U.S.
FILED
SEP
E. ROBERT

OCTOBER TERM, 1971

No. 71-65

ORLANDO J. BOWMAN, Trustee in Bankruptcy of the Estate of E. V. MOORE OF CALIFORNIA INC., Bankrupt, *Petitioner,*

vs.

BAY AREA PAINTERS' TRUST FUND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner,

vs.

BAY AREA PAINTERS' TRUST FUND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled matter on August 17, 1971.

CITATIONS OF OPINIONS BELOW

The orders entered by the District Court for the Northern District of California which were appealed to the Court of Appeals for the Ninth Circuit are not reported. They are printed in Appendix "A" hereto.

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix "B" hereto, and is unreported at this time.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 17, 1971 and is printed in Appendix "B" hereto, infra, p. xi. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

The sole statutory provision involved herein is §64a(2) of the Bankruptcy Act, 11 U.S.C. §104a(2), which states:

> §64. *Debts Which Have Priority.* a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * *
>
> (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or

commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *

QUESTION PRESENTED

The sole question involved herein is whether unpaid contributions by an employer to a union vacation and holiday trust fund, which are required by a collective bargaining agreement, are entitled in the bankruptcy proceeding of the employer to priority as being "wages . . . due to workmen" under §64a(2) of the Bankruptcy Act.

STATEMENT OF THE CASE

Orlando J. Bowman as Trustee in Bankruptcy in the bankruptcy matter of E. V. Moore of California, Inc., filed on November 13, 1968, in said bankruptcy proceeding his Objection to the Claim of the Bay Area Painters' Trust Fund asserting that said claim should be allowed as a general unsecured claim rather than as a wage priority claim as filed. The matter of said objection came on regularly for hearing before the Honorable Sheridan Downey, Jr., Referee in Bankruptcy, on December 20, 1968. The parties, through their respective counsel, stipulated that no factual issues were before the Court and that the only item before the Court was the legal issue as to the status of that part of the claimant's claim representing monies due and owing the union trust fund on the date of bankruptcy for vacation and holiday trust

fund contributions, i.e., is the union trust fund entitled to a wage priority status pursuant to §64a(2) of the Bankruptcy Act in the sum of $5,601.72 for the amounts due and owing to it from the bankrupt for vacation and holiday trust fund contributions.

Relying on this Court's decisions in *Joint Industry Board of Electrical Industry v. United States,* 391 U.S. 224, 20 L.Ed. 2d 54€ (1968) and *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 3 L.Ed. 2d 601 (1959), the Referee on March 18, 1969, filed his Order Sustaining Trustee's Objection to Priority Status Asserted for Claim and Allowing Claim as an Unsecured Claim Only. Said Order is printed in Appendix "A" hereto, p. i.

Thereafter the respondent filed its Petition for Review of the Referee's Order to the United States District Court for the Northern District of California. The District Court had jurisdiction to review the Order under §39c of the Bankruptcy Act (11 U.S.C. §67c). On April 28, 1969, the Honorable Alfonso J. Zirpoli, United States District Judge, relying on the decision of *Sulmeyer v. Southern California Pipe Trades Trust Funds,* 301 F.2d 768 (9th Cir. 1962), filed his Order Modifying Order of the Referee Relating to Claim 61 whereby the Order of the Referee was reversed and the vacation and holiday trust fund contributions were decreed to be entitled to a wage priority under §64a(2) of the Bankruptcy Act. Said Order is printed in Appendix "A" hereto, p. viii.

Thereafter, the Trustee in Bankruptcy, petitioner herein, appealed the District Court's decision to the

United States Court of Appeals for the Ninth Circuit. The Court of Appeals had jurisdiction to hear the appeals under §24 of the Bankruptcy Act (11 U.S.C. §47).

Relying on this Court's decision in *Lines v. Frederick,* 400 U.S. 18, 27 L.Ed. 2d 124 (1970) the Court of Appeals on August 17, 1971, affirmed the decision of the District Court on review. Said Decision of the Court of Appeals is printed in Appendix "B" hereto, p. xi.

The facts relevant to the issue at bar are the following:

The bankrupt, E. V. Moore of California, Inc., at all times relevant was a member of the Painting and Decorating Contractors Association of Contra Costa County; that said association was the designated collective bargaining representative acting for and on behalf of its members, including the bankrupt, in dealing with the various painters' unions in Northern California.

Said association had executed a Collective Bargaining Agreement with said painters' union for and on behalf of its members, including the bankrupt, effective during the time in question; that said Collective Bargaining Agreement provided in substance that the employers would contribute the following Union Trust funds for each painter employed who was a member of the Union:

14½ cents per hour to Welfare Trust Fund.
20 cents per hour to Vacation Trust Fund.

10 cents per hour to Pension Trust Fund.
10 cents per hour to Holiday Trust Fund.

The agreement provided that such employer contributions were to be paid to the trustees provided for in the various trust plans and were to be disbursed from the trust fund in accordance with authorization given by the trustee.

The trust plans provided that: "No beneficiary entitled to any benefits under the Trust or the Plan shall have the right to assign, transfer, encumber, pledge, mortgage, hypothecate, anticipate or impair in any manner his or her legal or beneficial interest or any interest in the assets of the Trust: that neither the Fund nor any of the assets thereof shall be liable for the debts of any beneficiary entitled to any benefits under the Trust Indenture or the Plan, nor be subject to attachment or execution or other process of any court".

The holiday and vacation contributions are not due to workmen from the bankrupt but rather are only due to the union trustees from the bankrupt.

The entire right, title and interest of the fund is vested in the union trustees.

Any employee covered who fails to apply to the union for his holiday allowance forfeits same.

Any employee who fails to take a vacation forfeits his rights to his vacation allowance.

One of the purposes of the Vacation Trust is to distribute unclaimed portions to the union welfare fund.

The Federal Withholding Tax was to be withheld at the time the vacation contributions were made.

The bankrupt's contributions due the vacation and holiday trust funds for the three months prior to the commencement of these proceedings were of the agreed amount of $5,601.72, and it is this sum that respondent asserts is entitled to a priority status under §64a(2) of the Bankruptcy Act.

REASON FOR GRANTING A WRIT

a. SUMMARY OF REASONS.

The paramount reason for granting a writ of certiorari is that this case raises important questions of interpretation of the Bankruptcy Act which are of a recurring nature. Because of their great importance in the administration of the estates of business bankrupts, these matters should be decided by the United States Supreme Court in that as set forth in the Court of Appeals' opinion the inferior courts have great difficulty in interpreting the words of art in a statute prior to this Court elaborating on same. Finally, the Court of Appeals did not even attempt to apply this Court's rule for deciding what constitutes "wages" under §64a(2) of the Bankruptcy Act, but rather, chose to rely on this Court's interpretation of the word "property" under §70a of the Bankruptcy Act.

b. THE COURT OF APPEALS BELOW DID NOT ATTEMPT TO APPLY THE TESTS LAID DOWN BY THIS COURT FOR DETERMINING IF EMPLOYER CONTRIBUTIONS TO UNION TRUST FUNDS CONSTITUTE WAGES UNDER §64a(2) OF THE BANKRUPTCY ACT, AS IT WAS REQUIRED TO DO, AND IT IS PETITIONER'S CONTENTION THAT IF THE TEST OF THIS COURT WERE APPLIED, THE COURT OF APPEALS WOULD HAVE BEEN REQUIRED TO HOLD THAT UNPAID CONTRIBUTIONS BY A BANKRUPT EMPLOYER TO A UNION VACATION AND HOLIDAY TRUST FUND ARE NOT ENTITLED, IN THE BANKRUPTCY PROCEEDING OF THE CONTRIBUTING EMPLOYER, TO A PRIORITY STATUS IN ASSET DISTRIBUTION AS BEING "WAGES . . . DUE TO WORKMEN" UNDER §64a(2) OF THE BANKRUPTCY ACT.

It is petitioner's position that the bankrupt employer's contributions to the union vacation and holiday trust fund in the case at bench are not "wages . . . due to workmen" under §64a(2) of the Bankruptcy Act as that code section has been interpreted by the Supreme Court of the United States in its decisions in the cases of *Joint Industry Board of the Electrical Industry v. United States,* 391 U.S. 224, 20 L.Ed. 2d 546 (1968) and *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 3 L.Ed. 2d 601 (1959).

The Referee in his opinion below agreed with petitioner's position that the reasoning of the United States Supreme Court cases was controlling in the case at bench.

The tests for determining if an employer contribution is due a wage priority were set forth by this Court in its *Embassy,* supra, and *Joint Industry Board of the Electrical Industry,* supra, decisions, and the tests were disregarded by the Court of Appeals for it to hold that the contributions in the case at bench

are entitled to a wage priority under §64a(2) of the Bankruptcy Act. As stated by the Referee in his opinion below, the Supreme Court in *Embassy Restaurant,* 3 L.Ed. 2d 601 at page 604, pointed out that the Court was interpreting a specific statute which was enacted by Congress to accomplish a specific purpose and that business practice or other statutes defining wages were not controlling on the Court in interpreting the meaning of "wages due to workmen" within the context of asset distribution under the Bankruptcy Act (359 U.S. at page 33).

The purpose of the wage priority of §64a(2) of the Bankruptcy Act was set forth by the Court in its decision of *Joint Industry Board of Electrical Industry,* supra, when it stated that the manifest purpose of the priority is to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due them in back wages, and thus alleviate to some degree the hardship that unemployment usually brings to workers and their families (391 U.S. at pages 226 and 227, 20 L.Ed. 2d at page 549).

The Court in confirming the *Embassy Restaurant* case continued by stating:

> "[t]he contributions there were payable to trustees, not to employees, and were disbursable to employees only on the occurrence of certain events, not including the bankruptcy of the employer. Neither the contributions nor the plan provided any immediate support for workmen during the period of financial distress." (391 U.S. at page 227, 20 L.Ed. 2d at page 549.)

Although factual distinctions exist between welfare contributions on the one hand and vacation and holiday contributions on the other and although the facts before this Court in the *Embassy Restaurant* and *Joint Industry Board of the Electrical Industry* specifically dealt with union welfare fund contributions, it is respectfully submitted that the difference of the purpose of the contributions in those cases does not affect the application of the basic test applicable in determining if a particular contribution is entitled to a wage priority under §64a(2) of the Bankruptcy Act; i.e., does the contribution, be it welfare or vacation or any other, become available to the employee on the occurrence of the bankruptcy of the employer for the immediate support of the workmen during the period of financial distress in order to alleviate to some degree the hardship that unemployment usually brings to workers and their families.

As set forth in the Referee's opinion below:

> The vacation contributions in the case at bar are paid directly to the trust fund trustee and said contributions are not payable to the employee in the event of the employer becoming a bankrupt, and in fact the contributions are not even subject to hypothecation or assignment, and thus it is difficult for this Court to conceive how these contributions provide any support for workmen during their period of financial distress immediately following bankruptcy, said payment during such period to alleviate the hardship of unemployment being the purpose of said wage priority.

In order for the Court of Appeals to have been correct, a test different in substance than that heretofore laid down by this Court must be applied in that the vacation and holiday fund contributions in the case at bench in no way, shape or form are receivable by the employee on the occurrence of the bankruptcy of the employer and they do not in any way alleviate the hardship occasioned upon the employee by the bankruptcy of the employer.

---

c. THIS CASE RAISES IMPORTANT QUESTION OF INTERPRETATION OF THE BANKRUPTCY ACT, WHICH ARE OF A RECURRING NATURE.

In every business bankruptcy filed when vacation and holiday union trust fund payments are due from the bankrupt to the union trust fund the question continually arises regarding the right of such payments to be classified as entitled to priority wage status. A determination of this question is of little concern to the trustee in bankruptcy in that its answer doesn't affect the trustee, but a definitive answer to said question directly affects all other creditors of the bankrupt who are entitled to receive payment of their claims after priority wage claims have been paid in full and it especially affects the United States of America because it occupies a third level of priority under §64 of the Bankruptcy Act subordinate to the wage priority of §64a(2) of the Bankruptcy Act.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Dated, Lafayette, California,
August 30, 1971.

Respectfully submitted,
MILTON MAXWELL NEWMARK,
Counsel for Petitioner, Orlando J. Bowman, Trustee in Bankruptcy of the Estate of E. V. Moore of California, Inc., Bankrupt.

LYNN ANDERSON KOLLER,
Of Counsel.

(Appendices "A" and "B" Follow)

Appendix "A"

In the United States District Court for the Northern District of California

In the Matter of E. V. Moore of California, Inc., a corporation, Bankrupt.	In Bankruptcy No. 74059

ORDER SUSTAINING TRUSTEE'S OBJECTION TO PRIORITY STATUS ASSERTED FOR CLAIM AND ALLOWING CLAIM AS AN UNSECURED CLAIM ONLY

Orlando J. Bowman Trustee in Bankruptcy having objected to priority status asserted for $5,601.72 of Claim No. 61 which claim is in the total amount of $14,993.97 and the matter of said Objection coming on regularly for hearing before this Court on December 20, 1968, and proof having been made to the satisfaction of this Court, this Court finds:

FINDINGS OF FACT

The above-named bankrupt at all times relevant was a member of the Painting and Decorating Contractors Association of Contra Costa County; that said Association at all times herein was the designated collective bargaining representative acting for and on behalf of its members, including the bankrupt, in dealing with the various painters unions in Northern California.

That said Association had executed a Collective Bargaining Agreement with said painters union for and on behalf of its members, including the bankrupt, effective during the time in question that said Collective Bargaining Agreement provided in substance that the employers would contribute the following Union Trust funds for each painter employed who was a member of the Union:

14-1/2 cents per hour to Welfare Trust Fund
20 cents per hour to Vacation Trust Fund
10 cents per hour to Pension Trust Fund
10 cents per hour to Holiday Trust Fund

The agreement provided that such employer contributions were to be paid to the trustees provided for in the various trust plans and were to be disbursed from the trust fund in accordance with authorization given by the trustee.

The trust plans provided that: No beneficiary entitled to any benefits under the Trust or the Plan shall have the right to assign, transfer, encumber, pledge, mortgage, hypothecate, anticipate or impair in any manner his or her legal or beneficial interest or any interest in the assets of the Trust; that neither the Fund nor any of the assets thereof shall be liable for the debts of any beneficiary entitled to any benefits under the Trust Indenture or the Plan, nor be subject to attachment or execution or other process of any court. The Trustees shall have no power to make any payment or distribution to any person entitled to any benefits under this Trust Indenture or the Plan except to the beneficiary personally or ex-

cept as it may otherwise be specifically provided in this Trust Indenture or the Plan.

That the bankrupt's contributions due the vacation and holiday trust funds for the four months prior to the commencement of these proceedings were of the agreed amount of $5,601.72 and it is this sum that claimant asserts is entitled to a priority status under Section 64a(2) of the Bankruptcy Act.

QUESTION INVOLVED

The question involved is whether contributions by an employer to a union vacation trust fund which are required by a collective bargaining agreement are entitled, in bankruptcy, to priority as being "wages . . . due to workmen" under §64a(2) of the Bankruptcy Act.

It is the Trustee in Bankruptcy's position that said employer contributions to a union vacation trust fund are not "wages . . . due to workmen" under §64a(2) of the Bankruptcy Act as that code section has been interpreted by the recent Supreme Court decision in the case of *Joint Industry, Board of the Electrical Industry v. United States,* 20 L.Ed. 2d 546 (1968), and its well known predecessor, *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 3 L.Ed. 2d 601, 79 S.Ct. 554 (1959).

On the other hand, the Bay Area Painters Trust Funds cites the case of *Sulmeyer v. Southern California Pipe Trades Trust Funds,* 301 F. 2d 768, C. A. 9th Cir. (1962) as authority holding that contributions to union trust funds for vacation pay are wages

entitled to priority under §64a(2) of the Bankruptcy Act. The *Sulmeyer* decision which was decided prior to the Supreme Court's decision in the case of *Joint Industry Board of the Electrical Industry,* supra, distinguishes vacation pay contributions from welfare fund payments which had been held not to be entitled to a wage priority in *Embassy Restaurant,* supra, on the following grounds:

1. Income tax had been withheld on the vacation contributions.
2. The contributions represented a percentage of wages paid rather than the flat monthly sum which had been contributed in *Embassy Restaurant,* supra.
3. The employee had vested rights in his vacation pay.
4. The vacation pay was definite and certain and not contingent as is the case of medical benefits which might or might not be used.

Although contributions to welfare and pension funds admittedly are different in substance than contributions to vacation funds, it is this Court's opinion that the Trustee's contention is well founded for the following reasons:

In the broad sense of the word all consideration received by an employee from his employer is defined as wages in that hypothetically at least all payments in whatever form they are made constitute part of the total wage package received by the employee. But the Supreme Court in *Embassy Restaurant,* 3 L.Ed 2d 601 at page 604 pointed out that the Court was

interpreting a specific statute which was enacted by Congress to accomplish a specific purpose and that business practice or other statutes defining wages were not controlling on the Court in interpreting the meaning of "wages due to workmen" within the content of asset distribution under the Bankruptcy Act.

The Supreme Court in the case of *Joint Industry Board of the Electrical Industry,* 20 L.Ed. 2d 546, at page 549 clearly set forth the purpose of the wage priority of Section 64a(2) of the Bankruptcy Act when it said that the manifest purpose of the priority is to enable employees displaced by bankruptcy to secure, with some promptness, the money directly due to them in back wages, and thus to alleviate to some degree the hardship that unemployment usually brings to workers and their family.

The Court at page 546 confirming to the Embassy Restaurant case continued by stating that "[t]he contributions there were payable to trustees, not to employees, and were disbursable to employees only on the occurrance of certain events, not including the bankruptcy of the employer. Neither the contributions nor the plan provided any immediate support for workmen during the period of financial distress.

The Supreme Court in the *Embassy Restaurant* and the *Board of Electrical Industry* cases was considering welfare and annuity contributions respectively while the case at bar concerns vacation contributions, but this Court is persuaded by the reasoning of these cases as set forth above rather than the

9th Circuit decision in *Sulmeyer,* supra. Although admittedly there are obvious differences between welfare and vacation contributions as specifically set forth in the *Sulmeyer* decision, these differences do not bring vacation contributions within the purposes of Section 64a(2) as interpreted by the Supreme Court of the United States.

The vacation contributions in the case at bar are paid directly to the trust fund trustee and said contributions are not payable to the employee in the event of the employer becoming a bankrupt, and in fact the contributions are not even subject to hypothecation or assignment, and thus it is difficult for this Court to conceive how these contributions provide any support for workmen during their period of financial distress immediately following bankruptcy, said payment during such period to alleviate the hardship of unemployment being the purpose of said wage priority.

As a final persuasive analysis the Supreme Court in the case of *Joint Industry Board of the Electrical Industry,* 20 L.Ed. 2d 546, at page 550 stated that of the $600 limitation of §64a(2) of the Bankruptcy if delinquent contributions to union trust funds for the benefit of employees were to have equal priority with wages payable directly to employees, the maximum payable immediately and directly to employees would be reduced whenever individual wage claims approached $600 or whenever the assets of the estate would not permit all wage claims to be paid in full. Obviously such a result would not be in accord with the purpose of §64a(2) of the Bankruptcy Act.

Wherefore It Is Ordered that the Trustee's Objection to priority claimed by the Bay Area Painters Trust Funds in Claim 61, is sustained and said claim is allowed as an unsecured claim in the sum of $14,903.97.

Dated, March 18, 1969.

/s/ Sheridan Downey, Jr.,
Referee in Bankruptcy.

Lodged Mar. 12, 1969,
Filed Mar. 18, 1969,

Sheridan Downey, Jr.,
Referee in Bankruptcy.

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United States District Court
Northern District of California

In the Matter of E. V. Moore of California, Inc., a corporation, Bankrupt.	In Bankruptcy No. 74059

ORDER MODIFYING ORDER OF THE REFEREE RELATING TO CLAIM 61

The specific question involved in this review is whether or not the unpaid vacation and holiday pay contributions which the bankrupt employer should have made within the three months' period preceding the bankruptcy to the Bay Area Painters Trust Fund are entitled to priority status under Section 64a(2) of the Bankruptcy Act.

This court is of the view that the decision of the Ninth Circuit Court in *Sulmeyer v. Southern California Pipe Trades Trust Funds,* 301 F.2d 768 is controlling and distinguishable from the facts adjudicated in *Joint Industry, Branch of Electrical Industry v. United States,* 391 U.S. 224 (1968) and its predecessor decision in *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29 (1959).

Contributions to a *welfare plan* (*United States v. Embassy, supra*) and contributions to a *pension plan* are contingent and deferred, do not create any vested right in the employee, are considered by the parties as contributions and not wages, and the employee pays no tax on the contribution.

On the other hand though the vacation and holiday benefits are paid to the Trust Fund, and this arises because of the multi-employer situation which prevails in the industry, and though the payments are made annually only for administrative convenience and economy, such vacation and holiday benefits are in fact wages and entitled to priority. They are considered as wages by the parties and treated as such in that the employee pays Federal Withholding Tax on his vacation and holiday pay *at the time it is earned.*

None of these controlling factual conditions apply to vacation and holiday benefit payments. Though such payments are made to the Trust Fund, and this arises because of the multi-employer situation which prevails in the industry, and though the payments to the employees from the Fund are made annually, only for administrative convenience and economy, they nevertheless constitute "wages" and are entitled to priority. They are considered as wages by the parties, represent a percentage of wages paid, are paid regularly, and are treated as wages in that the employee pays Federal Withholding Tax on such vacation and holiday pay *at the time it is earned.* Furthermore, unlike welfare and pension benefits, which are contingent and deferred, the employee has an immediate,

vested and certain right to his vacation and holiday pay.

The above noted factual distinctions between welfare and pension payments and vacation and holiday payments constitute such substantial and reasonable distinctions as bring the vacation and holiday payments made to the Bay Area Painters Trust Funds within the priority granted under Section 64a(2). Accordingly, on the authority of *Sulmeyer,* supra, the Referee is ordered to modify his order of March 18, 1969, by granting a Section 64a(2) of the Bankruptcy Act priority to the Bay Area Painters Trust Fund in Claim 61 in the sum of $5,601.72 and an allowance of the remainder of said Claim 61 as an unsecured claim.

Dated: April 28, 1969.

/s/ Alfonso J. Zirpoli
United States District Judge

Filed Apr. 28, 1969,
C. C. Evensen, Clerk.

Appendix "B"

United States Court of Appeals
For the Ninth Circuit

In the Matter of E. V. Moore of California, Inc., a corporation, Bankrupt.	
Orlando J. Bowman, Trustee in Bankruptcy, Appellant, vs. Bay Area Painters Trust Fund, Appellee.	No. 24,493

[August 17, 1971]

Appeal from Order of the United States District Court for the Northern District of California

Before: MADDEN, Judge of the United States Court of Claims,* BROWNING and KILKENNY, Circuit Judges.

MADDEN, Judge:

The Bay Area Painters Trust Fund was the trustee into whose hands employers of union painters were, under a collective bargaining agreement between the painters' union and the Painting Contractors Asso-

*J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.

ciation, required to pay sums of money which were intended, under the agreement, to be paid over by the trustee to the individual painters who had worked for members of the Contractors Association. The money involved in this appeal is "vacation pay" and "holiday pay" which the individual employers were obliged, under the contract to pay into the trust fund, for the benefit of the individual painters. The payment of these amounts to the trustee, rather than directly to the individual workman was convenient because a painter might, in the course of a period of time, work for several or many different contractors.

The union contract provided for payments by each employer into the vacation trust fund of 20 cents for each hour that the painter had worked for that employer and 10 cents into the holiday trust fund for each hour.

When bankruptcy proceedings were instituted in the case of E. V. Moore of California, Inc., the bankrupt painting contractor was in default to the vacation trust and holiday trust in the aggregate amount of $14,993.97. The Painters Trust Funds claimed preferential treatment in the distribution of the assets of the bankrupt, for $5,601.72 of the $14,993.77, on the ground of §64, sub. a(2), of the Bankruptcy Act, Title 11, U.S. Code, §104, sub. a(2), which provides as follows, in applicable parts:

> *Debts which have priority.* a. The debts to have priority in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt's estate and the order of payment shall be * * *

> (2) Wages and commissions not to exceed $600.00 to each claimant, which have been earned within three months before the date of the commencement of the proceeding due to workmen * * *.

The claim of the trust funds was opposed by the trustee in bankruptcy. The referee in bankruptcy disallowed the claim, and relegated the entire amount of $14,993.97 to the status of a general claim against the bankruptcy estate.[1]

The Painters Trust Funds petitioned the United States District Court for review of the Order of the Referee in Bankruptcy. The District Court, in an unreported decision, held that the vacation pay and holiday pay here involved constituted "wages", within the meaning of §64a(2) of the Bankruptcy Act, and that Vacation Pay and Holiday Pay Trust Funds were entitled to a preference, in the assets of the bankrupt, in the amount of $5,601.72. The District Court held that this Court's decision in *Sulmeyer v. Southern California Pipe Trades Trust Funds,* 301 F.2d 768 (1962), holding that vacation pay and holiday pay were "wages", within the meaning of §64 sub. a(2) of the Bankruptcy Act, was controlling, and was distinguishable from the decisions of the Supreme Court of the United States in *Joint Industry Board*

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[1]It seems to have been taken for granted that the amounts due to individual painters would not have exceeded $600.00 to any one painter, if the wages preference had been allowed. The same may be said for the absence of controversy as to $5,601.72 being the total amount "earned within three months", prescribed in the statute.

v. United States, 391 U.S. 224 (1968), and *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, (1959). The District Court's opinion did not mention this Court's decision in *Welfare Fund v. Bowie,* 283 F.2d 516 (1960), cert. den. 365 U.S. 817. That was proper, because *Sulmeyer, supra,* was more recent than *Bowie,* and is directly in point as regards the instant case.

Perhaps some mention of the Supreme Court's decision in *Lines v. Frederick,* 400 U S. 18, (Nov. 9 1970), would be proper, though neither party to the instant case has mentioned it. The Supreme Court in *Lines* affirmed this Court's decision, entitled *Frederick v. Lines,* 425 F.2d 215 (April 21, 1970). In *Lines* it was the workman rather than the employer, who went bankrupt. The question was whether the bankrupt workman's accrued vacation pay which had not been paid to him at the time he filed his petition in bankruptcy was "property" within the meaning of the word as used in §70a(5) of the Bankruptcy Act, 11 U.S. Code §110 (a)(5). The Supreme Court quoted the language used by it in an earlier opinion, *Segal v. Rochelle,* 382 U.S. 375, 379 (1966), as follows, 400 U.S. at 19:

> "[t]he main thrust of §70 a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because enjoyment must be postponed."

The Supreme Court added, however, that in its earlier case from which the foregoing quotation was taken, it had said:

> "'[i]t is impossible to give an categorical definition to the word "property," nor can we attach to it in certain relations the limitations which would be attached to it in others.'"

The Supreme Court continued in *Lines,* 400 U.S. at p. 19,

> The most important consideration limiting the breadth of the definition of "property" lies in the basic purpose of the Bankruptcy Act to give the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. * * *"

This court, exercising premonition, in *Frederick v. Lines,* supra, 425 F.2d 215 (1970), had held that the bankrupt workman Frederick's $137.28 of accrued vacation pay was not "property", within the meaning of §70 a(5) of the Bankruptcy Act and therefore still belonged to Frederick after he had gone through bankruptcy. This Court, in so holding, created a conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Kolb v. Berlin,* 356 F.2d 269 (1966). The Supreme Court, in *Lines v. Frederick, supra,* resolved the conflict by agreeing with this Court.

Our discussion of the *Lines v. Frederick* litigation may be justified because that litigation illustrates the difficulties which confront an inferior federal court

which must interpret words such as "property", "wages", and other words in the Bankruptcy Act, and apply those words to specific sets of facts, before the Supreme Court has had occasion to elaborate, the conflicting policies which urge its members in one or another direction.

The Supreme Court of the United States has not yet given the authoritative answer to our instant question, the question whether "holiday pay" and "vacation pay" are "wages" within the meaning of the word "wages" in §64 sub. a(2), of the Bankruptcy Act. The District Court in the instant case answered that question in the affirmative. We think that was the right answer, and we affirm the judgment.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No.

ORLANDO J. BOWMAN, Trustee in Bankruptcy of the Estate of E. V. Moore of California, Inc., Bankrupt,
Petitioner,

vs.

BAY AREA PAINTERS' TRUST FUND,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASE

Respondent, Bay Area Painters' Trust Fund, is the fringe benefit trust of the painting industry of Northern California created by collective bargaining agreement between labor and management. (Record pages 47, 48 and 49; Record pages 42 and 43.)

Like carpenters, painters electricians and plumbers, the painters here involved are part of the building and construction trades of Northern California and ordinarily work for several employers in the course of a year. The painters are dispatched to their various employers through a union hiring hall in the various local unions.

The bankrupt, E. V. Moore of California, Inc., was a painting contractor and a party to the Collective Bargaining Agreement.

The Collective Bargaining Agreement in effect at the time here involved, May 9, 1963, through August 9, 1963, required the bankrupt, E. V. Moore of California, Inc. as a painting contractor to pay to the respondent the following sums for each painter for each hour employed:

14½¢ per hour to Welfare Trust;
20¢ per hour to Vacation Trust;
10¢ per hour to Pension Trust;
10¢ per hour to Holiday Trust.
(Record page 6.)

The formal holiday trust document expressly provided that Federal Income Tax was to be withheld on holiday payments and that holiday payments were to be considered as part of the employee's wages. (Record page 45.) The holiday trust compelled respondent to pay out all accumulated holiday benefit on December 1st of each year upon application by the employee involved. (Record page 46.)

By Article 3 of the vacation trust, each employee subject to the trust shall take one continuous week-

long vacation during each vacation year. The time for vacation shall be scheduled by agreement between each employee and his then current employer, if any. Under Article 3 Section 3(b) the respondent shall, upon application, on April 1st of each year, pay to the employee involved his accumulated vacation money. Article 3 Section 2(a) requires employers to first withhold income tax from the sums paid as vacation pay and stipulates that payments to the respondent for vacation purposes are part of the employee's wages.

It is stipulated in this case that the Federal Withholding Income Tax was withheld by the bankrupt at the time the holiday and vacation contributions should have been made to respondent.

The painter employees who are beneficiaries of the respondent have thus paid Federal Income Tax on holiday and vacation benefits which they have yet to receive.

It is stipulated that the bankrupt's contributions which should have been made to the respondent for vacation and holiday trust purposes for the three months prior to the filing of bankruptcy, namely from May 9, 1963, to August 9, 1963, totaled $5,601.72. (Record page 85.)

The respondent, Bay Area Painters' Trust Fund, acting on behalf of itself and on behalf of each of the bankrupt's painter employees as set forth in the Record, pages 55 through 73, claims that the agreed amount $5,601.72 is entitled to priority status under Section 64a(2) of the Bankruptcy Act.

Holiday and vacation contributions are collected by respondent in this multi-employer painting industry for administrative convenience.

The contributions are paid out annually to the employee upon application.

REASONS FOR DENYING THE WRIT

(a) THERE IS NO UNSETTLED FEDERAL QUESTION AND NO CONFLICT OF DECISION

The lower federal Courts in this case have construed and applied two prior cases of this Court, *Joint Industry Board v. U.S.*, 391 U.S. 224, 20 L.Ed.2d 46, and *U.S. v. Embassy Restaurant*, 359 U.S. 29, 3 L.Ed. 601, to a slightly different fact situation. This is the normal judicial process. There is no conflict of decisions of the Courts of Appeals. The decision of the Court of Appeals below ascertained the underlying rationale of the prior cases and applied it to the new fact situation. Unless this Court is to review every single decision of the Courts of Appeals interpreting the meaning of "wages", there is no reason to grant the writ here.

(b) THE COURT OF APPEALS BELOW PROPERLY FOLLOWED AND APPLIED THE PRECEDENTS OF THIS COURT

Petitioner claims on page 8 of his petition that the Court of Appeals disregarded the tests laid down by this Court.

The Court of Appeals below adopted the reasoning and opinion of the District Court (see Petition Appendix, page xvi).

The District Court expressly considered and applied the applicable precedents (see Petition Appendix, page viii).

We believe (as apparently petitioner does also) that the case *Lines v. Frederick* 400 U.S. 18, 27 L.Ed.2d 124, does not apply to the instant case. The *Lines* case involved the question of whether vacation pay owed to a bankrupt employee was includable in the Bankruptcy estate under Section 70a of the Bankruptcy Act. This case involves the very different question of whether vacation pay owed by a bankrupt employer is entitled to priority of payment as "wages" from the bankruptcy estate under Section 64a(2). Different statutes and different policies are involved.

(c) UNPAID CONTRIBUTIONS BY A BANKRUPT EMPLOYER TO A FRINGE BENEFIT VACATION AND HOLIDAY TRUST FUND IN A MULTI-EMPLOYER INDUSTRY ARE ENTITLED IN BANKRUPTCY PROCEEDINGS TO PRIORITY STATUS AS "WAGES . . . DUE TO WORKMEN" UNDER SECTION 64a(2) OF THE BANKRUPTCY ACT.

It is unpaid vacation and holiday benefits only that are involved in this case. Health and Welfare benefits are not involved and pension benefits are not involved. Respondent concedes that under the current decisions of this Court, health and welfare benefits and pension benefits are not "wages" entitled to priority. This Court has not yet passed on the priority of vacation and holiday pay, although the Ninth Circuit has in the case *Sulmeyer v. Southern California Pipe Trades,* 301 F.2d 768. The *Sulmeyer* case held that vacation and holiday benefits were entitled to priority.

If an employee worked for a single employer under terms that provided two weeks paid vacation per year and the employer went bankrupt at the end of the two week vacation period, no one would doubt that the vacation pay earned within 90 days prior to bankruptcy is "wages" entitled to priority. See *Division of Labor Law Enforcement v. Sampsell,* 172 F.2d 400.

It was stated in *United States v. Munro-Van Helms Co.,* 243 F.2d 10, page 13:

> "Vacation pay is by all of the decisions regarded as wages."

See for example:

Koven v. Local 5767 United Steelworkers, 381 F.2d 196, 205;

Strauss-Duporquet v. Local 3 IBEW, 386 F.2d 649, 650.

In the case before the Court the holiday and vacation pay is accumulated in a trust only because the painter employee works for many different employers during the year in the building and construction industry. The collection trust is set up by the collective bargaining agreement because in the building trades no one employer can be obligated to provide an employee a vacation with pay.

The painter employees who are beneficiaries of the respondent have already paid their Federal Income Tax on the vacation and holiday pay here claimed. The painter employees have a vested right to the vacation and holiday pay and the respondent must pay the accumulated money to the painter employee upon application at designated times each year. The

payment is made annually only for administrative convenience and economy.

In 1959 in *U.S. v. Embassy Restaurant,* 359 U.S. 29, 3 L.Ed. 601, this Court held that contributions by an employer to a union health and welfare plan providing life insurance, sick benefits, hospital and surgical benefits were not "wages" entitled to priority. The Court relied on the following factors:

1. The flat monthly sum contributed of $8.00 per month had no relation to hours worked, wages or productivity.

2. The sum was paid to trustees, not the working man, and it was enforceable only by trustees.

3. The employee had no enforceable legal interest in the contributions.

4. The parties considered them contributions and not wages.

5. The trustees had the exclusive management of the funds.

In the Ninth Circuit 1962 case, *Sulmeyer v. Southern California Pipe Trades,* 301 F.2d 768, the Court held that contributions to a multi-employer fringe benefit trust fund for vacation and holiday purposes were "wages" entitled to priority and distinguished the *Embassy* case because of the following factors:

1. Income Tax had been withheld on the vacation and holiday contributions.

2. The contributions represented a percentage of wages paid and thus had a relation to hours worked and productivity.

3. The employee had vested rights as to his accumulated vacation and holiday pay.

4. The holiday and vacation pay was definite and certain and not contingent.

In the latest Supreme Court case, *Joint Industry Board v. U.S.*, 391 U.S. 224, 20 L.Ed.2d 46, 48, employer's contributions to a pension plan were held not to be wages entitled to priority because of the following factors:

1. The employee had only a contingent nonvested right to the pension.

2. Contributions were payable to a trustee, not the employee.

3. The employee was not taxed on the contribution. (See footnote 3.)

4. The benefits to the employees were deferred and provided no relief from the distress of temporary unemployment.

The crux of the opinion is the following, stated at 391 U.S. page 229:

> "If there is still any question as to whether claims for unpaid contributions to provide deferred benefits to employees should share the assets of bankrupts with general creditors or should be entitled to the limited priority granted wages due to workmen, any new resolution of that question should come from Congress."

The distinction from the cases is clear. Those fringe benefits which are *deferred and contingent* are not "wages" entitled to priority within the meaning of the

Bankruptcy Act. An employee may never get sick so that he may never draw health and welfare benefits. An employee may choose not to retire or may die prior to retirement and thus draw no pension benefits.

On the other hand, unpaid vacation and holiday benefits accrued within 90 days prior to bankruptcy are "wages" entitled to priority. Payment in the instant case of holiday and vacation benefits is made annually only for administrative convenience in a multi-employer industry. The employee has a definite vested right in the sums and can get both holiday and vacation pay annually merely upon filing an application. Neither holiday nor vacation pay is contingent.

In the instant case the rates of 10¢ per hour for holiday benefits and 20¢ per hour for vacation benefits are not flat contributions as in *U.S. v. Embassy Restaurant,* but have a direct relation to the hours worked and wages earned. 30¢ per hour was about 7% of the total hourly wage of $4.22.

Here the employee has an enforceable vested legal interest in the holiday and vacation accumulations.

Here the parties by express contract considered the contribution wages.

Here by express contract and by command of law, Federal Income Tax has already been paid or withheld on the sums involved.

In the case, *Joint Industry Board v. U.S.* (supra) this Court laid great stress that the purpose of the bankruptcy wages priority was to provide relief from the distress of temporary unemployment.

Those employees who work for many employers in the building and construction industry are just as distressed by the loss of their vacation and holiday benefits as is an employee who works for a single bankrupt employer. There is no reason to discriminate between the two employees in the multi-employer situation here involved. Here the employee gets his vacation and holiday benefits annually for reasons of administrative convenience. The painter knows he will get these benefits. They are vested. The painter can safely borrow money to finance his holiday and his vacation, secure in the knowledge that these benefits will come to him upon his application at the proper time. The knowledge by a painter employee that vacation and holiday benefits are definitely available can alleviate the hardship occasioned by the bankruptcy of the employer in today's credit economy almost as directly and certainly as wages paid directly to the employee.

The respondent respectfully urges that the reasoning of the Courts below is sound. Where a painter employee has paid income tax on his vacation and holiday pay, it would be harsh indeed to hold that what he paid tax on was other than wages.

Dated, Walnut Creek, California,
October 7, 1971.

Respectfully submitted,
DOUGLAS R. PAGE,
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Bay Area Painters' Trust Fund.